UNITED
NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 848

Case No. 936: KHAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Rubina Khan, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 31 December 1995 and to 31 March, 30 June and 30 September 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 30 June 1996, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 August 1996, the Applicant filed a corrected application, requesting the Tribunal to rule that:

"(i) The JAB [Joint Appeals Board] erred in finding that the Administration had made no binding commitment to promote the Applicant to the P-5 level.

(ii) The Applicant's right to due consideration to fill a P-5 post, number UNA-11110-E-P-5-002, was violated when the said post was given to an outside candidate without advertisement and without offering the Applicant any explanation.

(iii) In the absence of an up-to-date performance evaluation report (PER), the Applicant's candidacy

was not properly reviewed and her merit not properly considered by the APB [Appointment and Promotion Board].

(iv) For want of proper consideration of the Applicant's candidacy for promotion to the P-5 level, the decision of the APB not to include her in the 1992 promotion register cannot stand.

(v) The Secretary-General erred in upholding the JAB's recommendation not to support the appeal.

(vi) There is a special burden of proof on the Respondent as a result of the Applicant's gender which was not discharged.

7. Accordingly, the Applicant prays the Tribunal to order (a) that she be fully and fairly considered for promotion to the P-5 level at the earliest possible date; and (b) the Respondent to compensate her in the amount of $35,000 for personal injury, humiliation and stress suffered as a result of [the] unfair treatment she has received."

Whereas the Respondent filed his answer on 6 February 1997;

Whereas the Applicant filed written observations on 10 March 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 24 April 1977, on a one year, fixed-term appointment, as an Associate Expert (General Economics) at the L-1, step II level in Georgetown, Guyana. Her contract was subsequently extended until 16 February 1981, when she became an Associate Officer, at the P-2, step IV level, on a six-month fixed-term appointment, in the Office of the Director-General (ODG) for Development and International Cooperation at Headquarters. Her fixed-term appointment was extended until 15 November 1982, when it expired and the Applicant separated from service. On 13 December 1982, the Applicant was given a consultancy contract until 12 February 1983. This was converted into a short-term appointment until 12 August 1983, when

she separated from service. With effect from 13 April 1984, the Applicant was given a two-year, fixed-term appointment as an Economic Affairs Officer, at the P-3, step I level in the ODG for Development and International Cooperation. Her appointment was successively extended, and, on 1 April 1987, she was promoted to the P-4 level. On 1 August 1989, the Applicant's appointment was converted to probationary and, on 1 April 1991, to permanent. On 15 September 1992, the Applicant was assigned to the United Nations Operation in Mozambique.

On 1 May 1991, the Applicant wrote to the Director-General for Development and International Economic Cooperation (DIEC), requesting that she be recommended for promotion to the P-5 level, claiming that (i) "ever since [she] had been in the Director-General's Office [she] had been placed against a P-5 post", (ii) the Office had indicated that "it was justified to promote her to P-4 against a P-5 post because [she] was in fact performing [her] functions at the P-5 level" and (iii) she had been at the P-4 level since 1987 and her performance had been rated "very good".

In a Note for the File dated 27 February 1992, the Director-General for DIEC recorded that the Applicant had been working in that Office since 1981, was "extremely intelligent and ha[d] a special capacity to immerse herself completely in whatever duties [were] assigned to her", and "deserve[d] to be promoted to a higher grade which so far had not been possible as the Office did not have a P-5 post." He concluded by "strongly recommend[ing] that [the Applicant] be favourably considered for promotion at the earliest opportunity".

An ODG/DIEC Staffing Situation table as of 1 March 1992 listed the Applicant on post number UNA-28833-E-P-4-003, a "post on loan" from and to be returned to the Department of Administration and Management. It further stated that she was to encumber post number UNA-11110-E-P-5-002 when the staff member holding that post would be seconded to UNDP in April 1992. This "solution" also was

1992". The Applicant also sent another copy of the 8 November 1994 statement with the notation thereon over her signature: "The current year's figure (1992) should read B 601,576".

On 2 February 1995, the Acting Executive Secretary wrote to the Assistant Secretary-General for Human Resources Management (OHRM) pursuant to ST/AI/371, stating that the Applicant appeared to have altered the attestation of annual earnings in respect of her husband for the year 1992. The effect of the alteration was to reduce the total earnings of the Applicant's husband to an amount less than the established earnings limit for the year, thus qualifying the Applicant for payment of the dependency allowance in respect of her husband.

On 22 March 1995, the Acting Executive Secretary wrote to the Applicant, informing her of allegations of misconduct against her; in particular, the Applicant was charged with having altered the AIT Statement from BAHT 681,576 to BAHT 601,576. On 7 April 1997, the Applicant advised the Deputy Executive Secretary of ESCAP that "when I received the certificate of evidence dated 8 November 1994, I noticed that the expiry date of current contract was March 1977, which was wrong. As the matter was two years old and urgent, I immediately telephoned the AIT office and I read out what was certified and I was told that the expiry date should be March 1997 and the amount of the earnings should be B601,576. That is why when I was requested by Personnel, I confidently certified that figure was correct."

On 10 April 1995, the Applicant resigned for "family reasons". On 17 April 1995, she asked that other options less drastic than resigning be considered, such as compassionate leave so that she could be with her daughter, who had been the victim of an accident. She was permitted to withdraw the resignation.

On 18 April 1995, the Applicant wrote to the Deputy Executive Secretary, as follows:

"Since November 1991 I have suffered a tragedy and several setbacks in my personal life, which I am unable to put down on paper, and about which the Administration is only partly aware ... I have gone from one crisis situation to another, and have tried to deal with it as best as I could, but was unable to seek advice or help from anyone. I can talk about that in person to anyone from the Administration.

As I think about my action, I realize that I was completely out of my senses, as I did not even think that what I did would be considered as a crime."

On 7 May 1995, the Applicant wrote to the Deputy Executive Secretary, noting that:

"As I have explained in my memo of 7 April, when I received the 1992 certification, I noticed that the date of expiry of the contract was wrong. When I contacted AIT, I was informed not only about the date but also about the total earnings. While still married but estranged, I am not sure whether I was duped into changing the figure or I heard the figure wrong. Whatever it was, [with] hindsight, I do feel that I could have easily avoided committing such an irregular act by simply requesting ... another certificate. However, ... [m]y anguished state of mind must have weakened my judgement.

As I had not doubted that the correct figure was Baht 601,576, when the Personnel Section approached me to verify the figure I readily did so."

On 12 October 1995, the Assistant-Secretary General for OHRM wrote to the Chairperson of the Joint Disciplinary Committee (JDC), referring the Applicant's case to that body. The JDC adopted its report on 5 April 1996. Its conclusions and recommendations read, in part, as follows:

"15. The Committee noted that the problem started through negligence of the staff member in failing to complete the form for her spouse's 1992 earnings. This contributed to the sense of urgency when the required information actually did arrive from the employer.

...

be time-barred under staff rule 111.2(a), the Administration had made no administrative decision regarding the placement of the Appellant against a P-5 post. The Panel accordingly determined that this aspect of the Appellant's case was not receivable.

23. With respect to the Organization's failure to include the Appellant in the 1992 P-5 Promotion Register, the Panel observed that the Chairperson of the APB had advised the Appellant by letter dated 17 November 1993 that the Board had given 'full and careful consideration' to her recourse letter of 29 July 1993 and found that, 'notwithstanding the additional information presented in [her] communication, [its] re-examination of [her] case did not reveal that there were sufficient grounds to amend its previous decision'. The Panel considered such letter to constitute an 'administrative decision' against which the Appellant could appeal. The Panel accordingly considered the merits of this aspect of the Appellant's case.

B. The Substance of the Appeal

...

25. In the present case, the Appellant's name did not appear on the 1992 P-5 Promotion Register (ST/IC/1993/35) (24 June 1993). On 29 July 1993, the Appellant instituted a recourse procedure in accordance with Information Circular ST/IC/1993/35 against the non-inclusion of her name in the Register. ...

26. The Panel found that the Appellant had not alleged nor provided evidence of prejudice or any other extraneous factor leading to the 17 November 1993 decision of the APB not to include her name in the 1992 P-5 Promotion Register. Accordingly, the Panel found no justification for the Appellant's challenge against such decision on these grounds. While not sufficient to vitiate the APB's decision, the Panel did consider it unfortunate that the Appellant, and thus the APB, did not have PERs on her performance during the three years preceding her consideration for promotion to the P-5 level. The Appellant's most recent PER at that time covered the period from April 1989 through April 1990. The Panel considered that the lack of more recent PERs might have hindered the APB in its review.

27. The Panel next considered whether there had been 'a legal obligation binding on the Secretary-General' with respect to the promotion of the Appellant to the P-5 level. See, e.g., Judgement No. 134 (Furst).

...

30. ..., the Panel found that the Administration had made no binding commitment to promote the Appellant to the P-5 level. The Panel, however, considered it unfortunate that the Appellant, as early as 1992, was given reason to believe that she would be 'favourably considered for promotion [to the P-5 level] at the earliest opportunity' and yet, more than three years later, she had not received such a promotion. As the Administrative Tribunal has stated, 'the Administration must behave responsibly in its administrative arrangements and refrain from expressing hopes or intentions it has no expectation of fulfilling ...'. Judgement No. 444 (Tortel). The Panel further noted that the restructuring of first DIEC and then DESD might have had a detrimental effect on the Appellant's situation.

31. The Panel trusts that the Appellant will receive the full and fair consideration to which she is entitled for promotion to a vacant P-5 post for which she is qualified. In this respect, the Panel noted the applicability of the special measures to improve the status of women in the Secretariat set forth in ST/AI/382 (3 March 1993).

Recommendation

32. In light of the Panel's foregoing considerations, the Panel makes no recommendation in support of the subject appeal".

On 1 May 1995, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and has noted that it made no recommendation in support of your appeal. Accordingly, the Secretary-General has decided to take no further action on your case.

On 10 June 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Committee's report. He has accepted the Committee's conclusion that the charges brought against you of false certification, forgery, attempted fraud and misrepresentation in connection with your submission of an altered document in support of a request for payment of dependency benefits for the year 1992 were substantiated. He is also in agreement with the conclusion of the Committee that your conduct constituted a violation of your obligations under staff regulation 1.4, which requires staff members to conduct themselves at all times in a manner befitting their status as international civil servants, and a violation of the standards of integrity expected of all international civil servants.
>
> The Secretary-General has given careful consideration to the Committee's recognition of mitigating circumstances in your case and to your 18 years of satisfactory service. He has also given consideration to the seriousness of your actions in the light of your position as a senior official in the Organization, especially one with certifying authority. Considering all of the circumstances, the Secretary-General has concluded that your conduct constituted a serious violation of the UN standards of conduct and integrity expected of each staff member of the Organization and that this misconduct is incompatible with continued service with the Organization.
>
> In the light of this conclusion, the Secretary-General cannot accept the Committee's recommendation regarding disciplinary measures. Pursuant to his discretionary authority to impose an appropriate disciplinary measure for misconduct, the Secretary-General has decided to separate you from service with compensation in lieu of notice under staff regulation 10.2, paragraph 1 and staff rule 110.3(a)(vii) with effect from the date you receive this letter. The Secretary-General has also decided that, given the nature of the offence, no indemnity will be paid under Annex III(c)."

On 18 December 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JDC committed two procedural errors, which are uncontested by the Respondent and which amount to a denial of the high standard of due process to which the Applicant was entitled.

2. The extreme sanction imposed by the Organization from its Headquarters in New York was neither proportional nor appropriate to the actions of the Applicant and, further, did not conform to the findings or recommendations of those at the duty station.

Whereas the Respondent's principal contentions are:

1. Staff who obtain allowances or benefits on the basis of certification that proper information is supplied are responsible to ensure that such information is correct.

2. Disciplinary action is not criminal in nature. Once prima facie evidence of misconduct is established, the staff member has the onus to rebut it.

The Tribunal, having deliberated from 6 to 26 November 1997, now pronounces the following judgement:

I. The Applicant is appealing a decision of the Secretary-General not to accept the recommendations of the Ad hoc Joint Disciplinary Committee (JDC) but to separate her from service due to misconduct. In addition, her pleas to the Tribunal include, as a preliminary measure, that the Tribunal order the Respondent to communicate to the Applicant the "broad guidelines on sanctions applicable in cases of misconduct" as well as other information.

II. Regarding the Applicant's plea for this preliminary measure, the Tribunal recognizes the Respondent's admission that the Applicant was not provided with the "broad guidelines on sanctions

with respect to this claim, the Applicant's appeal is time-barred. Accordingly, the Tribunal has not considered the merits of this claim.

III. The second and more important issue in this case is whether the Applicant's rights were violated for want of proper consideration of her candidacy for promotion to the P-5 level. Further, the Tribunal must consider whether there was a binding promise to promote the Applicant to the P-5 level.

IV. The Applicant contends that in May 1991, she received an oral promise from the Director-General for Development and International Economic Cooperation (DIEC) to promote her to the P-5 level. In support of this contention, the Applicant refers to a Note for the File dated 27 February 1992, which recommends the Applicant for promotion and asks that consideration be given to this issue. However, the Note does not contain a binding promise to promote the Applicant. Accordingly, the Tribunal is unable to conclude that a binding commitment existed to promote the Applicant.

V. Next, the Tribunal must consider whether the Applicant's rights were violated by the manner in which the P-5 post, to which the Applicant claims she should have been assigned, was filled. The Tribunal notes that the P-5 post the Applicant was seeking was filled by an external candidate through what is alleged to have been a "private arrangement", without having been advertised. This appears to be a violation of staff regulation 4.4 which reads as follows:

> "Subject to the provisions of Article 101, paragraph 3, of the Charter and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations."

VI. The Tribunal has held on numerous occasions that staff members already employed by the United Nations have a right to the fullest consideration for appropriate vacancies. The breach of staff regulation 4.4. constitutes a violation of the Applicant's rights. (Cf. Judgements No. 310, Estabial (1983) and No. 362, Williamson (1986)). The manner in which the post was filled deprived the Applicant of her right to due consideration for promotion to the P-5 level. The Tribunal considers that, in accordance with its jurisprudence, the Applicant had a statutory right to due consideration of her candidature for post number UNA-11110-E-P-5-002. The failure of the Administration to do so violated her rights and she is therefore entitled to compensation.

VII. In addition, the Tribunal considered whether the fact that there was no up-to-date PER violated the Applicant's rights to full and fair consideration for promotion to the P-5 level. The Tribunal has repeatedly held that the Organization must comply with its own procedures, which include the timely evaluations of a staff member's performance. "It is the responsibility of the Administration to ensure that personnel records required by promotion review bodies are complete, up-to-date, and submitted in a timely fashion. The Tribunal finds that the Applicant's right to be duly considered for inclusion in the ... Promotion Register was not fully respected and, as a consequence, the responsibility of the Organization is engaged." (Cf. Judgement No. 586, Atefat (1992)). For this, the Applicant is also entitled to compensation.

VIII. For the foregoing reasons, the Tribunal orders the Respondent:

1. To consider the Applicant fully and fairly for promotion to the P-5 level as soon as possible; and

2. To pay the Applicant an amount equal to four months of her net base salary, at the rate in effect on the date of this

judgement, as compensation for the procedural irregularities set forth in paragraphs VI and VII above.

IX. The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary